

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SHIRLEY B.,

Plaintiff,

Case No. C18-5355JLR

V.

NANCY A. BERRYHILL,

Defendant.

ORDER REVERSING AND REMANDING DENIAL OF BENEFITS

I. INTRODUCTION

Plaintiff Shirley B. (“Plaintiff”), on behalf of Douglas L. (“Claimant”),¹ seeks review of the denial of an application for disability insurance benefits. (See Pl. Op. Br. (Dkt. # 11) at 2.) Plaintiff contends that the Administrative Law Judge (“ALJ”) erred by: (1) improperly rejecting Claimant’s testimony; and (2) improperly rejecting the opinions of Claimant’s treating physician, Roxanne Ho, M.D. (See *id.*). As discussed below, the court REVERSES the final decision of Defendant Nancy A. Berryhill, Deputy Commissioner of the Social Security Administration for Operations (“Commissioner”).

¹ Claimant died while his claim was pending before the Social Security Administration. (See Exh. A to Pl. Op. Br. (Dkt. # 11-1).) Plaintiff is Claimant's mother (*see id.*), and brought this action pursuant to 20 C.F.R. § 404.503(b)(3). (See Compl. (Dkt. # 3) ¶ 4.)

1 and REMANDS the matter for further proceedings under sentence four of 42 U.S.C.
2 § 405(g).

3 **II. THE ALJ'S DECISION**

4 Utilizing the five-step disability evaluation process, 20 C.F.R. § 404.1520, the
5 ALJ found:

6 **Step one:** Claimant did not engage in substantial gainful activity from August 28,
7 2015, the amended alleged onset date, through December 31, 2015, the date last
8 insured. *See* 20 C.F.R. §§ 404.1571-76.

9 **Step two:** Through the date last insured, Claimant had the following severe
10 impairments: left shoulder degenerative joint disease; status post right foot
11 surgery; diabetic neuropathy; and diabetic retinopathy. *See* 20 C.F.R.
12 § 404.1520(c).

13 **Step three:** Through the date last insured, Claimant did not have an impairment
14 or combination of impairments that met or medically equaled the severity of one
15 of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. *See* 20
16 C.F.R. §§ 404.1520(d), 404.1525, 404.1526.

17 **Residual Functional Capacity:** Through the date last insured, Claimant had the
18 residual functional capacity ("RFC") to perform light work as defined in 20 C.F.R.
19 § 404.1567(b), with the following exceptions. He could lift and/or carry 20
20 pounds occasionally and 10 pounds frequently. He could stand and/or walk for
21 four hours and sit for six hours in an eight-hour work day. He could occasionally
22 climb ladders, ropes, scaffolds, ramps, or stairs. He could occasionally crawl and
23 balance. He could occasionally reach overhead with the non-dominant left arm.
He could frequently, but not continuously, read on the job. He could frequently,
but not continuously, use effective visual acuity on the job.

24 **Step four:** Through the date last insured, Claimant could not perform any past
25 relevant work. *See* 20 C.F.R. § 404.1565.

26 **Step five:** Considering Claimant's age, education, work experience, and RFC,
27 there were jobs that existed in significant numbers in the national economy that
28 Claimant could perform. *See* 20 C.F.R. §§ 404.1569, 404.1569(a).

29 (Admin. Record ("AR") (Dkt. # 8) at 18-32.) Based on these findings, the ALJ found

that Claimant had not been under a disability, as defined by the Social Security Act, at any time between August 28, 2015, the amended alleged disability onset date, and December 31, 2015, the date last insured. (*Id.* at 32.) The Appeals Council denied Plaintiff's request for review, making the ALJ's decision the Commissioner's final decision. (*See id.* at 1-3.)

III. ANALYSIS

Claimants bear the burden of proving they are disabled within the meaning of the Social Security Act. *See Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). Pursuant to 42 U.S.C. § 405(g), the court may set aside a denial of social security benefits only when the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving any other ambiguities that exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Although the court is required to examine the entire record, it may neither reweigh the evidence nor substitute its judgment for that of the ALJ. *See Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

A. The ALJ Erred in Rejecting Claimant's Symptom Testimony

Plaintiff contends that the ALJ harmfully erred in evaluating Claimant's symptom testimony. (Pl. Op. Br. at 4-9.) The court agrees.

The Ninth Circuit has “established a two-step analysis for determining the extent to which a claimant’s symptom testimony must be credited.” *Trevizo v. Berryhill*, 871

1 F.3d 664, 678 (9th Cir. 2017). The ALJ must first determine whether the claimant has
2 presented objective medical evidence of an impairment that ““could reasonably be
3 expected to produce the pain or other symptoms alleged.”” *Id.* (quoting *Garrison v.*
4 *Colvin*, 759 F.3d 995, 1014-15 (9th Cir. 2014)). At this stage, the claimant need only
5 show that the impairment could reasonably have caused some degree of the symptoms;
6 he does not have to show that the impairment could reasonably be expected to cause the
7 severity of the symptoms alleged. *Id.* The ALJ found that Claimant met this step
8 because his medically determinable impairments could reasonably be expected to cause
9 some of the symptoms he alleged. (AR at 23.)

10
11 If the claimant satisfies the first step, and there is no evidence of malingering, the
12 ALJ may only reject the claimant’s testimony ““by offering specific, clear and convincing
13 reasons for doing so. This is not an easy requirement to meet.”” *Trevizo*, 871 F.3d at 678
14 (quoting *Garrison*, 759 F.3d at 1014-15). In evaluating the ALJ’s determination at this
15 step, the court may not substitute its judgment for that of the ALJ. *Fair v. Bowen*, 885
16 F.2d 597, 604 (9th Cir. 1989). As long as the ALJ’s decision is supported by substantial
17 evidence, it should stand, even if some of the ALJ’s reasons for discrediting a claimant’s
18 testimony fail. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001).

19
20 Here, the ALJ, finding no evidence of malingering, rejected Claimant’s testimony.
21 (AR at 23.) The ALJ gave two reasons for this determination: (1) Claimant’s symptom
22 testimony was inconsistent with his treatment records and the medical evidence; and (2)
23 Claimant’s symptom testimony was inconsistent with his daily activities. (*See id.*)

1. The ALJ Erred in Rejecting Claimant's Symptom Testimony as Inconsistent with the Medical Evidence

The ALJ first discounted Claimant's testimony because he determined that Claimant's statements about the intensity and persistence of his symptoms were inconsistent with the treatment record. (*See id.* at 23.) To support this finding, the ALJ summarized much of the medical evidence and concluded that Claimant's primary conditions either improved or stabilized to the point that Claimant was capable of light work with the additional restrictions identified in the RFC. (*See id.* at 23-28.)

The problem here is that the ALJ never actually linked his summary of the medical evidence to Claimant’s testimony. “[A]n ALJ does not provide specific, clear, and convincing reasons for rejecting a claimant’s testimony by simply reciting the medical evidence in support of his or her residual functional capacity determination.” *Brown v. Hunter-Colvin*, 806 F.3d 487, 488 (9th Cir. 2015). Instead, the ALJ must “specify which testimony [he] finds not credible, and then provide clear and convincing reasons, supported by evidence in the record, to support that credibility determination.” *Id.*

The ALJ did exactly what the Ninth Circuit ruled ALJs may not do: He listed a number of medical findings and concluded that this evidence supported the RFC, but did not identify what aspects of Claimant’s testimony he disbelieved, or how the medical findings contradicted that testimony. (See AR at 23-28.) The only time the ALJ directly linked his discussion to Claimant’s testimony was when he agreed with that testimony. (See *id.* at 23.) The ALJ’s discussion was insufficient, and he thus erred in rejecting Claimant’s symptom testimony as inconsistent with the medical evidence.

1 2. The ALJ Erred in Rejecting Claimant’s Symptom Testimony as
2 Inconsistent with Claimant’s Daily Activities

3 The ALJ next discounted Claimant’s testimony because he found it inconsistent
4 with Claimant’s actual functioning as demonstrated by his daily activities. (*See id.* at 28.)
5 Much like his treatment of the medical evidence, the ALJ listed Claimant’s daily
6 activities, but failed to link them in any meaningful way to Claimant’s testimony. An
7 ALJ may consider a claimant’s daily activities in assessing his testimony. *See Fair*, 885
8 F.2d at 603. But the court will not “take a general finding—an unspecified conflict
9 between [a] [c]laimant’s testimony about daily activities and [his] reports to
10 doctors—and comb the administrative record to find specific conflicts.” *Burrell v.*
11 *Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014). Rather, the ALJ must identify specific
12 inconsistencies between a claimant’s testimony and his daily activities in order to
13 reasonably reject the testimony. *Id.*

14 The ALJ made two findings in support of his determination that Claimant’s daily
15 activities were inconsistent with his testimony, but neither withstands scrutiny. First, the
16 ALJ stated that Claimant testified he “could stand/walk for four to five hours by the
17 spring of 2016,” suggesting that this aligned with the RFC, which limited Claimant to
18 standing/walking for four hours in an eight-hour work day. (AR at 27.) This was not an
19 accurate interpretation of Claimant’s testimony. Claimant testified that he could stand for
20 “maybe 20 minutes at a time” for a total of four to five hours “over the whole day.” (*Id.*
21 at 75.) But more importantly, the ALJ did not point out any contradiction here. (*See id.*
22 at 28.) He simply restated—inaccurately—a portion of Claimant’s testimony. (*Id.*)

1 Second, the ALJ noted that Claimant performed activities such as household
2 chores and walking the dog. (*Id.* at 28.) Again, the ALJ did not adequately explain what
3 parts of Claimant’s testimony these activities contradicted. Claimant acknowledged that
4 he performed household chores such as cleaning the dishes and vacuuming, but also
5 testified that he did the chores in stages rather than for hours on end. (*See id.* at 83-84.)
6 The ALJ noted that Claimant was “ambulating well” when in fact the record on which the
7 ALJ relied stated that Claimant was “ambulating well in a post-op shoe.” (*Id.* at 28, 657.)
8 The ALJ also noted that Claimant was walking his dog during the alleged disability
9 period, citing to a note in which Claimant sought treatment for his knee after stepping on
10 a rock while walking his dog. (*See id.* at 28, 971.) But the ALJ did not indicate what
11 aspects of Claimant’s testimony these records contradicted, and the court will not search
12 the record to find a contradiction for the ALJ. *See Burrell*, 775 F.3d at 1138.

14 In sum, the ALJ erred because he failed to explain what aspects of Claimant’s
15 testimony he was rejecting, and how substantial evidence supported that rejection. *See*
16 *Brown*, 806 F.3d at 488. The ALJ was permitted to interpret the evidence and determine
17 Claimant’s RFC, but he could not reject Claimant’s symptom testimony without
18 providing clear and convincing reasons for doing so. *See Rounds v. Comm’r Soc. Sec.*
19 *Admin.*, 807 F.3d 996, 1006 (9th Cir. 2015).

20 **B. The ALJ Erred in Rejecting the Opinions of Dr. Ho**

21 Plaintiff contends that the ALJ erred in rejecting the opinions of Claimant’s
22 treating physician, Dr. Ho. (Pl. Op. Br. at 9-13.) The court agrees.

1 An ALJ must provide clear and convincing reasons to reject the uncontradicted
2 opinions of a treating physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996)
3 (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)). When the treating doctor's
4 opinions are contradicted, the ALJ must provide "specific and legitimate reasons that are
5 supported by substantial evidence in the record." *Lester*, 81 F.3d at 830 (citing *Andrews*,
6 53 F.3d at 1042). The ALJ can satisfy this requirement "by setting out a detailed and
7 thorough summary of the facts and conflicting clinical evidence, stating his interpretation
8 thereof, and making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)
9 (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

10
11 Dr. Ho was Claimant's treating physician. (AR at 692.) She produced two
12 medical source statements that the ALJ considered. (*Id.* at 28-29, 692-96, 1153-57.) In
13 June 2016, Dr. Ho opined that Claimant suffered from diabetes, among a number of other
14 diagnoses, which was not under good control. (*Id.* at 692.) She opined that Claimant had
15 significant walking, standing, sitting, lifting, postural, and reaching restrictions. (*Id.* at
16 692-93.) Dr. Ho also opined that Claimant suffered from anxiety and depression, which
17 impacted his productivity and ability to maintain attendance at a job. (*Id.* at 694.)

18
19 In January 2017, Dr. Ho signed a second medical source statement. (*Id.* at
20 1153-57.) Dr. Ho's opinions remained largely the same, with slightly less limiting
21 postural restrictions, more limiting reaching restrictions, and new handling restrictions.
22 (See *id.* at 1153-54.)

23 The ALJ gave Dr. Ho's opinions little weight. (*Id.* at 29.) He concluded that they

1 were: (1) inconsistent with the medical evidence; and (2) contradicted by Claimant's
2 testimony regarding his functioning. (*Id.*)

3 1. The ALJ Erred in Discounting Dr. Ho's Opinions as Inconsistent with the
4 Overall Medical Evidence

5 An ALJ may reject the opinions of a treating physician when they are inconsistent
6 with the overall medical record. *See Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d
7 1190, 1195 (9th Cir. 2004). But the ALJ's interpretation of the record must be reasonable
8 and supported by substantial evidence in the record. *See Thomas*, 278 F.3d at 954.

9 The ALJ found that Dr. Ho's opinions were "grossly inconsistent with the overall
10 medical evidence of record during the relevant period." (AR at 29.) He rested this
11 finding on three considerations. First, the ALJ criticized Dr. Ho's opinions because she
12 "t[ook] into account physical and mental health conditions that were not diagnosed
13 during the relevant period." (*Id.*) In particular, the ALJ noted that Claimant "did not
14 endorse or receive treatment for a mental health condition during this period." (*Id.*)
15 Setting aside the pitfalls of chastising a claimant for not seeking mental health treatment,
16 *see Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996), the ALJ's conclusion says
17 nothing about the legitimacy of Dr. Ho's opinions on Claimant's physical limitations, on
18 which Plaintiff has largely focused. (*See Pl. Op. Br.* at 11-12.)

20 Second, the ALJ found that although Dr. Ho "routinely treated the claimant for his
21 physical conditions," she "rarely perform[ed] actual physical examinations." (AR at 29.)
22 This finding is meritless. As the ALJ acknowledged, Dr. Ho saw Claimant on a regular
23 basis. (*See id.*) She did not need to perform a full physical examination every time she

1 saw Claimant to be able to give a medical opinion on his conditions. Dr. Ho no doubt
2 evaluated Claimant's conditions during his appointments, and could reasonably form an
3 opinion as to his abilities on that basis. *See* 20 C.F.R. § 404.1527(c)(2).

4 Third, the ALJ pointed out that some of Claimant's conditions improved or
5 stabilized with treatment. (AR at 29.) Although there is some validity to this finding, it
6 cannot overcome the ALJ's numerous other errors. *Cf. Burrell*, 775 F.3d at 1140
7 (holding that "one weak reason," even if supported by substantial evidence, "is
8 insufficient to meet the 'specific, clear and convincing' standard" for rejecting a
9 claimant's testimony) (quoting *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012)).
10 The ALJ consequently erred in rejecting Dr. Ho's opinions as inconsistent with the
11 overall medical evidence.

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13 2. The ALJ Erred in Rejecting Dr. Ho's Opinions as Inconsistent with
14 Claimant's Testimony Regarding His Functioning

15 The ALJ further rejected Dr. Ho's opinions as inconsistent with Claimant's
16 testimony regarding his level of functioning. (AR at 29.) But the ALJ provided no
17 analysis or support for this contention. (*See id.*) The ALJ stated only that Claimant
18 "provided testimony regarding his functioning during the relevant period that contradicts
19 [Dr. Ho's] opinion." (*Id.*) This finding was too general to support rejection of Dr. Ho's
20 opinions. *See Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1199-200 (9th Cir. 2008).
21 Again, it is not the court's task to search for inconsistencies in the record that support the
22 ALJ's position. *See Burrell*, 775 F.3d at 1138. The ALJ needed to identify the
23 inconsistencies between Claimant's testimony and Dr. Ho's opinions, and explain how

1 they justified rejecting Dr. Ho's opinions. *See Ryan*, 528 F.3d at 1199-200. The ALJ did
2 not do so, and thus erred in rejecting Dr. Ho's opinions as inconsistent with Claimant's
3 testimony.

4 Neither of the ALJ's reasons for rejecting Dr. Ho's opinions withstand scrutiny.
5 He thus failed to provide specific and legitimate reasons for rejecting Dr. Ho's opinions,
6 and consequently erred. *See Lester*, 81 F.3d at 830.

7 **C. Scope of Remand**

8 Plaintiff asks the court to remand for an award of benefits. (Pl. Op. Br. at 2.)
9 Remand for an award of benefits "is a rare and prophylactic exception to the
10 well-established ordinary remand rule." *Leon v. Berryhill*, 880 F.3d 1041, 1044 (9th Cir.
11 2017). The Ninth Circuit has established a three-step framework for deciding whether a
12 case may be remanded for an award of benefits. *Id.* at 1045. First, the court must
13 determine whether the ALJ has failed to provide legally sufficient reasons for rejecting
14 evidence. *Id.* (citing *Garrison*, 759 F.3d at 1020). Second, the court must determine
15 "whether the record has been fully developed, whether there are outstanding issues that
16 must be resolved before a determination of disability can be made, and whether further
17 administrative proceedings would be useful." *Treichler v. Comm'r of Soc. Sec. Admin.*,
18 775 F.3d 1090, 1101 (9th Cir. 2014) (internal citations and quotation marks omitted). If
19 the first two steps are satisfied, the court must determine whether, "if the improperly
20 discredited evidence were credited as true, the ALJ would be required to find the
21 claimant disabled on remand." *Garrison*, 759 F.3d at 1020. "Even if [the court]
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reach[es] the third step and credits [the improperly rejected evidence] as true, it is within the court's discretion either to make a direct award of benefits or to remand for further proceedings." *Leon*, 880 F.3d at 1045 (citing *Treichler*, 773 F.3d at 1101).

The appropriate remedy here is to remand for further proceedings. Although the first step of the Ninth Circuit's framework is met, the second is not. Cognizant of the fact that Claimant cannot give any further testimony due to his passing, the court nonetheless cannot resolve the ambiguities that remain in this matter. The court is not in a position to translate Claimant's testimony or Dr. Ho's opinions into an RFC. *See Rounds*, 807 F.3d at 1006. As a result, the court cannot determine whether Claimant was disabled under the Social Security Act. *See* 20 C.F.R. § 404.1520(a)(4).

On remand, the ALJ must reassess Claimant's testimony and reevaluate Dr. Ho's opinions. The ALJ must reassess Claimant's RFC and findings at steps four and five, and conduct further proceedings as necessary to reevaluate the disability determination in light of this opinion.

IV. CONCLUSION

For the foregoing reasons, the Commissioner's final decision is REVERSED and this case is REMANDED for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

Dated this 21st day of December, 2018.



JAMES L. ROBART
United States District Judge